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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

STEVEN ROSELAREN, Plaintiff and Appellant, v. CITY OF BERKELEY et al., Defendants and Respondents	A097483 (Alameda County Super. Ct. No. 01-016920)

Appellant Steven Roselaren filed a petition for a writ of mandate, challenging a decision by the City of Berkeley and others (collectively, the City) to issue a building permit and zoning certificate for an addition to a single-family residence in his neighborhood. The petition alleged violations of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. (CEQA)) and of several local ordinances.[1] The trial court denied the petition, and we affirm the judgment.

BACKGROUND

The underlying facts are straightforward and largely undisputed. Appellant, who is appearing in propria persona, lives in a single-family residence on Fresno Avenue. In July 2001, the City issued a building permit and zoning certificate to appellant's next-door neighbors, Charles Teller and Elisabeth Bigelow-Teller, for a 486-square foot addition to their single-family residence. Construction began soon thereafter.

[1] All subsequent statutory references are to the Public Resources Code unless otherwise indicated.

Appellant filed a petition for writ of mandate under section 21168.5 of CEQA and Code of Civil Procedure section 1085, seeking to compel the City to set aside the permit and certificate and comply with CEQA and its own local ordinances. The petition alleged, among other matters, that the proposed addition was not exempt from CEQA review because it was "both subject to discretionary authority by the City and one of a number of overlapping and cumulatively significant activities." The first and second causes of action of the petition alleged that the City violated CEQA by failing to "examine a timely written request for a CEQA analysis for plausible argument before acting on the [p]roject" and by failing to examine the energy effects of the project. The third and fourth causes of action alleged that the project violated various sections of the City's municipal code because its size, scale, and siting were incompatible with the surrounding neighborhood and because no permit had been obtained for excessive construction noise.

Eventually, after appellant's request for a preliminary injunction was denied and settlement meetings did not resolve the dispute, a hearing was held on the petition.[2] The trial court took the matter under submission and later issued a detailed and well-reasoned statement of decision denying the petition and ordering entry of judgment for the City. The court concluded that substantial evidence supported the City's determinations (1) that the issuance of the building permit was a ministerial act statutorily exempt from the requirements of CEQA, and (2) that it was also categorically exempt from those requirements. In addition, the court found that appellant had not established any abuse of discretion by the City under its own zoning and noise ordinances.

Judgment was entered denying the petition, and this appeal followed.

DISCUSSION

A. Statutory Exemptions From CEQA

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[2] Real parties in interest Charles Teller and Elisabeth Bigelow-Teller appeared at the hearing on the petition in the trial court. They have not filed a brief in this appeal.

Generally, CEQA applies to discretionary projects. (§ 21080, subd. (a).) "A discretionary project is one subject to 'judgmental controls,' i.e., where the agency can use its judgment in deciding whether and how to carry out the project. [Citations.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112, italics omitted (*Mountain Lion*).) Other projects are expressly exempt from the requirements of CEQA. Among these statutory exemptions are "[m]inisterial projects proposed to be carried out or approved by public agencies." (§ 21080, subd. (b)(1).)

The administrative regulations promulgated to implement CEQA (Cal. Code Regs., tit. 14, § 15000 et seq. (hereafter, Guidelines)) provide that the determination of what is ministerial can most appropriately be made by the particular public agency involved based on its analysis of its own laws, and that each public agency should make that determination either as a part of its own implementing regulations or on a case-by-case basis. (Guidelines, § 15268, subd. (a).) Issuance of building permits is presumed to be ministerial "[i]n the absence of any discretionary provision contained in the local ordinance or other law establishing the requirements for the permit . . . ." (Guidelines, § 15268, subd. (b).) "A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee." (Guidelines, § 15369.) "Run-of-the-mill building permits *are* 'ministerial' actions not requiring compliance with CEQA." (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 277.)

We recognize that issuance of a building permit is not always ministerial. When approval of a project has both ministerial and discretionary components, it will be deemed discretionary and subject to CEQA. (Guidelines, § 15268, subd. (d).) Thus issuance of a building permit is a discretionary project within the meaning of CEQA if a statute or local ordinance authorizes the agency to exercise discretion to deny or condition or modify the project to mitigate problems an environmental impact report might uncover. (See e. g. *Friends of Westwood, Inc. v. City of Los Angeles, supra,* 191

Cal.App.3d at pp. 273-278 [approval process for a 26-story office tower involved several discretionary determinations]; *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1139-1143 [conditions imposed on building permit for large hotel indicate issuance of permit was a discretionary project].) But if an application for a building permit complies fully with the requirements for its issuance, and no statute or local ordinance gives the public agency discretion to deny or condition the permit, CEQA simply does not apply. (*Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 87.) "The statutory distinction between discretionary and purely ministerial projects implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless exercise. [Citation.]" (*Mountain Lion, supra*, 16 Cal.4th at p. 117.)

On appeal in a mandate proceeding challenging an agency's decision on the ground that it did not comply with CEQA, this court examines the administrative record to determine whether there has been a prejudicial abuse of discretion by the agency. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 116-117; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 903.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.) When the facts are undisputed, this court's determination of whether issuance of a permit was ministerial or discretionary is a question of law for our de novo review. (*Prentiss v. City of South Pasadena*, *supra*, 15 Cal.App.4th at p. 89; see e.g. *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp.* (1976) 59 Cal.App.3d 959, 969-971; *Day v. City of Glendale* (1975) 51 Cal.App.3d 817, 820-825.)

B. Issuance of the Building Permit

With the foregoing principles in mind, we consider the issuance of the building permit at issue in this appeal.

Section 21082 requires public agencies to adopt objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact

reports and negative declarations. To comply with that requirement, the City has adopted Environmental Review Procedures (Procedures) describing its procedures for environmental review and explaining the integration of these procedures with its planning, project review, and approval procedures. Section 2.4 of the Environmental Review Procedures defines ministerial projects as "those projects over which the City has no discretionary power to deny or condition, providing the project meets specified code requirements." Section 2.4 also expressly provides that ministerial permits include "[b]uilding permits (if no design or landmarks review is required)."

Here, it is undisputed that the applicable zoning allowed the proposed addition to be built in the requested location, that the proposed addition complied with specified code requirements, that the applicants paid the fee for the permit, and that no local ordinance required design or landmarks review. (See Guidelines, § 15369; Procedures, § 2.4.) Nevertheless, appellant argues that issuance of the building permit had a discretionary component because the City has discretionary power under its local ordinances to regulate the environmental impact of construction noise. (See e.g. Berkeley Mun. Code, § 13.40.090.) Appellant also asserts that the City has other ordinances giving it discretionary power over project construction, such as Berkeley Municipal Code section 16.16.010 [Public Works Department permit required to store construction materials on a street or sidewalk].

Appellant's argument is without merit. The decision to issue the building permit was ministerial because it involved only the use of fixed standards and objective measurements, without any subjective judgment on whether or how the project should be carried out. (Guidelines, § 15369.) None of the ordinances cited by appellant gave the City discretionary power to impose conditions on issuance of the building permit itself. Instead, as the trial court pointed out, those ordinances might be invoked, if at all, only after the building permit process was completed and even then, only if the permitted construction resulted in a demonstrated violation of the ordinances. We also agree with the trial court's observation that to adopt appellant's theory about the effect of these

ordinances would be to hold that every single building permit issued by the City is subject to CEQA.

To summarize, the Guidelines, the cases interpreting the Guidelines, and the City's ordinances and procedures compel the conclusion that issuance of the building permit in this case was a ministerial action as a matter of law and as such was statutorily exempt from CEQA.

C. Categorical Exemptions From CEQA

Appellant disagrees with the trial court's alternative conclusion that issuance of the permit was also categorically exempt from CEQA.

A project not statutorily exempt may nonetheless be "categorically" exempt. (See *Mountain Lion*, *supra*, 16 Cal.4th at p. 124.) The Guidelines enumerate certain classes or categories of projects that have been determined not to have a significant effect on the environment. (Guidelines, § 15300 et seq.) A project falling within one of these categorical exemptions is not subject to CEQA. (*Mountain Lion*, at p. 124.) Among these exemptions are minor interior or exterior alterations to existing private structures, including additions that will not result in an increase of more than 50 percent of the floor area or 2,500 square feet, whichever is less. (Guidelines, § 15301, subd. (e)(1).)

The Guidelines also establish exceptions to the categorical exemptions, including that the exemptions are inapplicable "when the cumulative impact of successive projects of the same type in the same place, over time is significant." (Guidelines, § 15300.2, subd. (b).) Appellant relies on this exception to argue that the categorical exemption for minor additions should not apply because there have been other noisy remodeling projects in his neighborhood. Appellant cites no authority for the proposition that temporary construction noise from successive categorically exempt projects constitutes a significant cumulative environmental effect within the meaning of the regulation. In any event, our conclusion that the issuance of the permit was a statutorily exempt ministerial action makes it unnecessary to consider any of appellant's arguments regarding the categorical exemption. "Since ministerial projects are already exempt, Categorical Exemptions should be applied only where a project is not ministerial under a public

agency's statutes and ordinances. The inclusion of activities which may be ministerial within the classes and examples [of categorical exemptions] shall not be construed as a finding by the Secretary for resources that such an activity is discretionary." (Guidelines, § 15300.1.)

Appellant argues in passing that the City violated CEQA because it did not consider the energy effects of the proposed addition, but our conclusion that issuance of the permit was exempt from CEQA is also dispositive of that argument.

D. The Zoning Certificate

Appellant alleged in his third cause of action that the proposed addition violated Berkeley Municipal Code section 23D.16.020 in that its "size, scale, and siting" were "incompatible with the surrounding neighborhood," and he sought to compel the City to comply with the ordinance.

Code of Civil Procedure section 1085 authorizes issuance of a writ of mandate to compel a public official to perform an act required by law. A petitioner seeking the writ must show a clear, present, and usually ministerial duty on the part of the respondent, and a clear, present and beneficial right in the petitioner to the performance of that duty. When the duty alleged arises out of a statute or legislative enactment, this court must engage in de novo review of the trial court's refusal to issue the writ. (*Bergeron v. Department of Health Services* (1999) 71 Cal.App.4th 17, 21-22.)

The writ is also available to correct an abuse of discretion by an administrative official. A court reviewing an administrative decision under Code of Civil Procedure section 1085 asks only whether the decision was arbitrary, capricious, or entirely without evidentiary support. When this court reviews a trial court's judgment on a petition for writ of mandate, we apply the substantial evidence test to the trial court's factual findings, and exercise our independent judgment on the legal issues, such as the meaning of statutes and ordinances. (*McIntyre v. Santa Barbara County Employees' Retirement System* (2001) 91 Cal.App.4th 730, 733-734; *Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 52-53.)

Under title 23 of the Berkeley Municipal Code, a zoning certificate is required for construction that is allowed as a matter of right by the ordinance. Before obtaining a building permit, an applicant must apply for a zoning certificate. The certificate must be issued if the zoning officer determines that the proposed building is allowed as a matter of right by the ordinance and conforms to all applicable development and use standards therein. (Berkeley Mun. Code, §§ 23B.20.010, 23B.20.020, 23B.20.040, 23B.20.060.)

The development standards for single-family residential districts appear in Berkeley Municipal Code section 23D.16.070, which specifies lot size, height limits, and set back and side lot requirements, among other matters. It is undisputed that the City found the plans for the proposed addition to be in compliance with these development standards and issued the certificate. Appellant does not contend that the addition was not in conformance with these standards. Instead, he argues that the City should not have issued the zoning certificate without making factual findings on the consistency of the project with the general goals for residential districts articulated in Berkeley Municipal Code section 23D.16.020, goals that include protecting adjacent properties from unreasonable obstruction of light and air.

The City explains that it assesses compliance with these general goals only in conjunction with its review of applications for discretionary use permits and that such compliance is not a test for issuance of a zoning certificate as a matter of right. The City's explanation of its procedure is consistent with its ordinances, which require specific findings only for approval or denial of a discretionary use permit. (Compare Berkeley Mun. Code, §§ 23D.16.090, 23B.32.040, 23B.20.060.) It is well settled that the contemporaneous administrative construction of a statute or ordinance by the administrative agency charged with its enforcement is entitled to great weight and will be followed unless clearly erroneous. (*Baldwin v. City of Los Angeles* (1999) 70 Cal.App.4th 819, 838.) Appellant has not established that the City's interpretation of its own ordinances was clearly erroneous or that the City had any legal duty to make express findings regarding light and air before issuing the zoning certificate in this case.

Appellant also argues that the local ordinance on its face makes an arbitrary and unreasonable distinction between projects over and under 500 square feet, but he does not argue that the ordinance as applied in this case is unconstitutional. Instead, without clearly elucidating the nature of the distinction he finds objectionable, he states that he is raising "a general claim of arbitrary classification as a general rule, not of personal hardship." His ill-defined equal protection argument is raised for the first time in this appeal, and we will not consider it.

E. The Noise Ordinance

Appellant's fourth cause of action alleged that the project violated Berkeley Municipal Code section 13.040.090 because the construction created noise levels beyond those allowed and no permit for excessive noise was obtained. Based on those allegations, he sought to compel the City to comply with its noise ordinances.

The trial court concluded that there was substantial evidence to support the City's determination that the construction noise from the project did not exceed lawful levels for similar projects in similar residential areas and did not otherwise impose a significant noise impact on the surrounding area. It also found that appellant had offered no facts, reasonable assumptions predicated on facts, or expert opinion supported by facts to contradict the City's showing.

As we understand appellant's argument, he contends that the City's interpretation of its own ordinances regulating noise, which the trial court accepted, was incorrect. According to appellant, under his reading of those ordinances, the noise levels of the construction project were excessive. He makes a related argument that the City's failure to enforce the noise ordinances, as he interprets them, deprived him of due process and equal protection. But appellant has not demonstrated that the City misconstrued its own ordinances, and we agree with the trial court's assessment of the evidence on this issue.

DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

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Stein, Acting P.J.

_____
Swager, J.